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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Heulon Brown,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.

No. CV-15-0446-TUC-LCK

ORDER

14
15 Petitioner Heulon Brown has filed a Petition for Writ of Habeas Corpus pursuant
16 to 28 U.S.C. § 2254. Before the Court are the Petition (Doc. 1), Respondents' Answer
17 (Doc. 10), and Petitioner's Reply and three supplements (Docs. 18-21, 26). The parties
18 have consented to Magistrate Judge jurisdiction. (Doc. 14.)

19 **FACTUAL AND PROCEDURAL BACKGROUND**

20 Brown was convicted in the Pima County Superior Court on one count of first-
21 degree murder; one count of first-degree burglary; two counts of aggravated assault of a
22 minor under fifteen; three counts of aggravated assault, deadly weapon/dangerous
23 instrument, firearm; and four counts of attempted armed robbery. (Doc. 10, Ex. B.)
24 Brown was sentenced to concurrent prison terms, the longest of which is twenty-five
25 years to life. (*Id.*)

26 The Arizona Court of Appeals summarized the facts in support of Brown's
27 convictions:

28 One evening in August 2010, four armed, masked men, including Brown,
went to the door of an apartment and a fifth man, E.V., who was not

1 masked, was forced to enter the apartment at gunpoint ahead of them.
2 Immediately after opening the door, E.V., who was known to the
3 apartment's occupants, dropped to the floor, placed his hands on his head,
4 and curled into a ball while the gunmen ordered the occupants to "get on
5 the ground." One of those occupants, J.J., had a gun and shot at the masked
6 men, killing Michael White and injuring Brown. During the exchange, J.J.
7 and A.B., a minor who was in the apartment, also were shot and injured.

8 (*Id.*, Ex. C at 2.)

9 Brown appealed and the Arizona Court of Appeals affirmed his convictions and
10 sentences. (*Id.*, Exs. C, E, H.) Brown's Petition for Review to the Arizona Supreme Court
11 was denied. (*Id.*, Exs. K, M.) Brown filed a Notice of Post-conviction Relief (PCR). (*Id.*,
12 Ex. N.) He subsequently withdrew the notice because an investigator was unable to locate
13 witness Eduardo Vega, who was the intended source of newly discovered evidence that
14 Brown intended to present in a PCR proceeding. (*Id.*, Ex. O.)

15 **DISCUSSION**

16 Brown raises six claims. (Doc. 1.) Respondents contend Claim 4 is procedurally
17 defaulted, and the Court will first examine whether that claim is properly exhausted.
18 Respondents concede the remainder of the claims were properly exhausted and the Court
19 will review them on the merits.

20 **EXHAUSTION**

21 **Principles of Exhaustion and Procedural Default**

22 A writ of habeas corpus may not be granted unless it appears that a petitioner has
23 exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v.*
24 *Thompson*, 501 U.S. 722, 731 (1991). To properly exhaust, a petitioner must "fairly
25 present" the operative facts and the federal legal theory of his claims to the state's highest
26 court in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848
27 (1999); *Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Picard v. Connor*, 404 U.S. 270, 277-
28 78 (1971).

In Arizona, there are two primary procedurally appropriate avenues for petitioners
to exhaust federal constitutional claims: direct appeal and PCR proceedings. A habeas

1 petitioner's claims may be precluded from federal review in two ways. First, a claim may
2 be procedurally defaulted in federal court if it was actually raised in state court but found
3 by that court to be defaulted on state procedural grounds. *Coleman*, 501 U.S. at 729-30.
4 Second, a claim may be procedurally defaulted if the petitioner failed to present it in state
5 court and "the court to which the petitioner would be required to present his claims in
6 order to meet the exhaustion requirement would now find the claims procedurally
7 barred." *Coleman*, 501 U.S. at 735 n.1; *see also Ortiz v. Stewart*, 149 F.3d 923, 931 (9th
8 Cir. 1998) (stating that the district court must consider whether the claim could be
9 pursued by any presently available state remedy). If no remedies are currently available
10 pursuant to Rule 32, the claim is "technically" exhausted but procedurally defaulted.
11 *Coleman*, 501 U.S. at 732, 735 n.1; *see also Gray v. Netherland*, 518 U.S. 152, 161-62
12 (1996).

13 Because the doctrine of procedural default is based on comity, not jurisdiction,
14 federal courts retain the power to consider the merits of procedurally defaulted claims.
15 *Reed v. Ross*, 468 U.S. 1, 9 (1984). However, the Court will not review the merits of a
16 procedurally defaulted claim unless a petitioner demonstrates legitimate cause for the
17 failure to properly exhaust the claim in state court and prejudice from the alleged
18 constitutional violation, or shows that a fundamental miscarriage of justice would result if
19 the claim were not heard on the merits in federal court. *Coleman*, 501 U.S. at 750.

20 **Claim 4**

21 Brown alleges that Arizona's felony murder statute is unconstitutional because, in
22 his case, its application was premised upon the justifiable shooting of an intruder by a
23 victim.¹

24
25 ¹ In the Reply brief, Brown argues that using accomplice liability for a first-degree
26 felony murder conviction is unconstitutional because he was not convicted upon proof of
27 every element of the offense. (Doc. 18 at 14.) The claim is not properly before this Court
28 because it was not included within the Petition. *See* Rule 1(c)(1), Rules Governing § 2254
Cases, 28 U.S.C. foll. § 2254 (requiring petition to specify all grounds for relief). Further,
this claim is procedurally defaulted because the Arizona Court of Appeals found it
waived for failure to raise it in the opening brief. (Doc. 10, Ex. C at 19.)

1 In his opening appellate brief, Brown argued that Arizona's felony murder statute
2 violated Due Process and the Eighth Amendment prohibition on excessive sentences.
3 (Doc. 10, Ex. E at 25.) Citing to other states, Brown argued that felony murder should
4 require a mens rea more than that of the underlying felony and that the death must occur
5 in furtherance of the felony. (*Id.* at 26-27.) He also relied upon the principle that more
6 severe punishment is warranted for those that intentionally cause harm. (*Id.* at 28 (citing
7 *Enmund v. Florida*, 458 U.S. 782, 798 (1980).)

8 It is debatable whether Brown fairly presented Claim 4 to the Arizona Court of
9 Appeals. It was not articulated to that court in the same way it is presented in his habeas
10 petition. However, in his appellate brief he cites to other states that have restricted felony
11 murder to killings by the felon or co-felons, rejecting it for a justifiable killing of one of
12 the felons. (Doc. 10, Ex. E at 26-28.) Further, the Court of Appeals addressed this factual
13 argument in its ruling. (*Id.*, Ex. C at 18.) Regardless of exhaustion, below, the Court will
14 address the claim on the merits.

15 **MERITS**

16 **Legal Standards for Relief under the AEDPA**

17 The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) created a
18 "highly deferential standard for evaluating state-court rulings" . . . demand[ing] that state-
19 court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24
20 (2002) (per curiam) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7 (1997)). Under the
21 AEDPA, a petitioner is not entitled to habeas relief on any claim "adjudicated on the
22 merits" by the state court unless that adjudication:

- 23 (1) resulted in a decision that was contrary to, or involved an
24 unreasonable application of, clearly established Federal law, as determined
25 by the Supreme Court of the United States; or
- 26 (2) resulted in a decision that was based on an unreasonable
27 determination of the facts in light of the evidence presented in the State
28 court proceeding.

1 28 U.S.C. § 2254(d). The last relevant state court decision is the last reasoned state
2 decision regarding a claim. *Barker v. Fleming*, 423 F.3d 1085, 1091 (9th Cir. 2005)
3 (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991)); *Insyxiengmay v. Morgan*, 403
4 F.3d 657, 664 (9th Cir. 2005).

5 “The threshold test under AEDPA is whether [the petitioner] seeks to apply a rule
6 of law that was clearly established at the time his state-court conviction became final.”
7 *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Therefore, to assess a claim under
8 subsection (d)(1), the Court must first identify the “clearly established Federal law,” if
9 any, that governs the sufficiency of the claims on habeas review. “Clearly established”
10 federal law consists of the holdings of the Supreme Court at the time the petitioner’s state
11 court conviction became final. *Williams*, 529 U.S. at 365; see *Carey v. Musladin*, 549
12 U.S. 70, 74 (2006).

13 The Supreme Court has provided guidance in applying each prong of
14 § 2254(d)(1). The Court has explained that a state court decision is “contrary to” the
15 Supreme Court’s clearly established precedents if the decision applies a rule that
16 contradicts the governing law set forth in those precedents, thereby reaching a conclusion
17 opposite to that reached by the Supreme Court on a matter of law, or if it confronts a set
18 of facts that is materially indistinguishable from a decision of the Supreme Court but
19 reaches a different result. *Williams*, 529 U.S. at 405-06; see *Early v. Packer*, 537 U.S. 3,
20 8 (2002) (per curiam). Under the “unreasonable application” prong of § 2254(d)(1), a
21 federal habeas court may grant relief where a state court “identifies the correct governing
22 legal rule from [the Supreme] Court’s cases but unreasonably applies it to the facts of the
23 particular . . . case” or “unreasonably extends a legal principle from [Supreme Court]
24 precedent to a new context where it should not apply or unreasonably refuses to extend
25 the principle to a new context where it should apply.” *Williams*, 529 U.S. at 407. For a
26 federal court to find a state court’s application of Supreme Court precedent
27 “unreasonable,” the petitioner must show that the state court’s decision was not merely
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1 incorrect or erroneous, but “objectively unreasonable.” *Id.* at 409; *Schriro v. Landrigan*,
2 550 U.S. 465, 473 (2007); *Visciotti*, 537 U.S. at 25. “A state court’s determination that a
3 claim lacks merit precludes federal habeas relief so long as “‘fairminded jurists could
4 disagree’ on the correctness of the state court’s decision.” *Harrington v. Richter*, 131 S.
5 Ct. 770, 786 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

6 Under the standard set forth in § 2254(d)(2), habeas relief is available only if the
7 state court decision was based on an unreasonable determination of the facts. *Miller-El v.*
8 *Dretke*, 545 U.S. 231, 240 (2005) (Miller-El II). In considering a challenge under
9 § 2254(d)(2), state court factual determinations are presumed to be correct, and a
10 petitioner bears the “burden of rebutting this presumption by clear and convincing
11 evidence.” 28 U.S.C. § 2254(e)(1); *Landrigan*, 550 U.S. at 473-74; *Miller-El II*, 545 U.S.
12 at 240.

13 **Claim 1**

14 Brown alleges the admission of three involuntary statements violated his right to
15 remain silent and his right to a fair trial. In particular, he was questioned in the hospital
16 after surgery, necessitated by Brown being shot during the home invasion underlying his
17 convictions. Brown alleges he was in pain, on medication, and doing his best stay
18 conscious.

19 The Arizona Court of Appeals denied this claim:

20 Following the home invasion, Brown, who had been shot in the chest, was
21 taken to Tucson’s University Medical Center where he underwent
22 emergency surgery. The same day, approximately six hours after the
23 surgery, police detectives questioned him about the incident (the August 26
24 interview). At the beginning of the interview, Detective Diaz informed
25 Brown that he was being detained and advised him of his rights pursuant
26 to *Miranda*, after which Brown said, “I’ll answer your questions.”
Although Brown had been given medication, Detective Cassel noted that
the conversation was “normal” and “coherent,” and “nothing ... was
limiting [Brown’s] ability to communicate.” Diaz similarly noted that
Brown was lucid and able to engage in active conversation. At the
conclusion of the interview, Brown was informed he was under arrest.

27 ¶ 6 At approximately two o’clock the following morning, Diaz returned to
28 the hospital and continued questioning Brown (the August 27 interview).
The detective asked, “Obviously, you remember your rights from yesterday

1 and you still understand them, we're still good with that? Yeah?" Brown
2 responded, "Ah-[h]ah," and proceeded to answer questions. At no point
3 during either interview did Brown invoke his right to remain silent or his
4 right to counsel. Finally, seven days later, while still hospitalized, Brown
5 initiated a conversation with Diaz (the September 3 interview). The
6 detective did not remind him of his rights, and Brown made additional
7 statements. Before trial, Brown moved to suppress all of his statements on
8 the ground he had not given them voluntarily. The trial court denied the
9 motion after conducting an evidentiary hearing, and statements from the
10 three interviews were introduced at trial.

11

12 [A]lthough detectives observed that Brown was "hooked up to many
13 monitors and ... an IV," and that he appeared to be in pain, they testified he
14 was "lucid" and able to engage in active conversation, his answers to their
15 questions were coherent and responsive, and "nothing ... was limiting his
16 ability to communicate." Brown at one point requested pain medication,
17 and the nurse informed him she would provide the medication as soon as
18 the interview was over. Brown did not ask for the questioning to stop, nor
19 did he repeat his request for pain medication.

20 ¶ 10 The detectives made no promises or threats to Brown. And, after
21 informing him of the nature of the questions they wanted to ask, about a
22 minute into the encounter the detectives read him his rights, which he said
23 he understood. Brown agreed to continue answering questions, and did so
24 for about an hour. Nothing in the recording of the interview or the
25 suppression testimony indicated Brown's will had been overborne. The trial
26 court reviewed and considered the audio recording of the interview when
27 determining voluntariness, as have we, and it supports the court's ruling.
28 Under these circumstances, we find no abuse of discretion in the court's
finding that Brown's statements were voluntary. And because his
arguments relating to the voluntariness of the statements given in the
subsequent interviews hinge on a finding of involuntariness in the first, we
need not address them.

(Doc. 10, Ex. C at 3-6.)

A defendant is deprived of due process if his conviction is founded upon an
involuntary confession. *See Dickerson v. United States*, 530 U.S. 428, 432 (2000). To
ensure due process, the test for determining the voluntariness of a suspect's confession is
whether, considering all the circumstances, the government obtained the statement by
physical or psychological coercion or by inducement so that the suspect's will was
overcome. *See United States v. Coutchavlis*, 260 F.3d 1149, 1158 (9th Cir. 2001) (citing
Haynes v. Washington, 373 U.S. 503, 513-14 (1963)).

1 Utilizing the totality of the circumstances test, both the characteristics of the
2 accused and the details of the interrogation are considered. *See Dickerson*, 530 U.S. at
3 434; *see also Haynes*, 373 U.S. at 513-14. The circumstances to be considered include:
4 (1) whether there was police coercion; (2) the length of the interrogation, its location and
5 its continuity; (3) whether police advised the suspect of his rights; and (4) whether there
6 were any direct or implied promises of a benefit. *Clark v. Murphy*, 331 F.3d 1062, 1072
7 (9th Cir. 2003), *overruled on other grounds by Lockyer v. Andrade*, 538 U.S. 63, 71
8 (2003). “A statement is involuntary if it is extracted by any sort of threats or violence,
9 [or] obtained by any direct or implied promises, however slight, [or] by the exertion of
10 any improper influence.” *Id.* (quoting *Hutto v. Ross*, 429 U.S. 28, 30 (1976)). Courts also
11 consider the defendant’s age, education, the nature of any questioning, and the use of any
12 physical punishment such as the deprivation of food or sleep to determine voluntariness.
13 *See United States v. Haswood*, 350 F.3d 1024, 1027 (9th Cir. 2003) (citing *Schneckloth v.*
14 *Bustamonte*, 412 U.S. 218, 226 (1973)). “In short the true test of admissibility is that the
15 confession is made freely, voluntarily, and without compulsion or inducement of any
16 sort.” *Haynes*, 373 U.S. at 513-14. The question of whether a suspect’s inculpatory
17 statements were voluntary is typically a mixed question of law and fact. *See Miller v.*
18 *Fenton*, 474 U.S. 104, 111-12 (1985). This Court must defer to the underlying factual
19 determinations. *Lambert v. Blodgett*, 393 F.3d 943, 977-78 (9th Cir. 2004).

20 With respect to the first interview, Brown alleges it was involuntary because he
21 was in pain and pain medication was withheld during the interrogation. The trial and
22 appellate court found that Brown was read and waived his *Miranda* rights, and was
23 questioned for approximately one hour. (Doc. 10, Ex. C at 6; Ex. Q at 2.) The trial court
24 found that Brown was able to speak coherently, never expressed confusion, did not
25 request pain medication again after it was denied, and never asked for the questioning to
26 be stopped. (*Id.*, Ex. Q at 2.) Brown has not alleged he was threatened or promised
27 anything, and the appellate court found he was not. (*Id.*, Ex. C at 6.) Despite Brown’s
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1 hospitalization and recent emergency surgery, the totality of circumstances reveal
2 Brown's statement was not coerced nor was his will overborne.

3 As to the second statement, Brown alleges it was involuntary because he did not
4 acknowledge that he had received *Miranda* rights. To the contrary, the appellate court
5 found that when the detective mentioned that Brown had been read his rights the previous
6 day, Brown verbally acknowledged that statement. Additionally, a suspect need not be re-
7 advised of his rights when a second statement is close in time (up to two days) to the
8 advisement of rights before a first statement and no evidence suggests the effectiveness
9 of the earlier warning has diminished. *See United States v. Rodriguez-Preciado*, 399 F.3d
10 1118, 1128-29 (9th Cir. 2005) (considering initial warning sufficient when no intervening
11 event indicates a change in rights, such as different interrogator or interview location, and
12 suspect in custody the whole time). Brown did not invoke his right to remain silent or to
13 counsel during the second interview. The singular challenge Brown raises as to this
14 statement, based on *Miranda*, has no factual basis. To the extent Brown's challenge to his
15 second statement relies upon his challenge to his first statement, it fails based on the
16 Court's finding of voluntariness as to that statement.

17 With respect to the third statement, Brown alleges he was not read his *Miranda*
18 rights and he believed he was detained and not under arrest. Relying on quotes from the
19 first interrogation, the trial court found that Brown clearly understood after his first
20 statement that he was under arrest, was a suspect in a homicide case, and was going to be
21 taken to jail when released from the hospital. (Doc. 10, Ex. Q at 3-4.) Brown has
22 presented no evidence to overcome the presumption of correctness this Court must give
23 to those findings. 28 U.S.C. § 2254(e)(2). Brown had been advised of his rights at the
24 time his first statement was taken and reminded of them when his second statement was
25 obtained. Both times he waived his rights and answered questions. Although a substantial
26 period of time elapsed between the second and third interviews (seven days), Brown
27 initiated the third contact with the detective. *See United States v. Teaupa*, 617 F. App'x
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1 699, 700 (9th Cir. 2015) (considering fact that suspect initiated conversation as a sign that
2 statements were voluntary). Considering the totality of the circumstances, Brown’s third
3 statement was voluntary.

4 Brown also alleges that his right to remain silent was violated because he was
5 compelled to testify based on the admission of his three pretrial statements. Because the
6 Court has found Brown’s pretrial statements were voluntary and properly admitted, his
7 decision to testify did not violate his right against self-incrimination.² *See Harrison v.*
8 *United States*, 392 U.S. 219, 222 (1968).

9 The state court’s denial of this claim was not objectively unreasonable.

10 **Denial of Jury Instructions – Claims 2, 3, and 5**

11 Jury instruction issues are generally matters of state law for which federal habeas
12 relief is not available. *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). As
13 a matter of federal law, relief is only available when a defendant shows that instructional
14 error “so infected the entire trial that the resulting conviction violates due process.” *Id.* at
15 72. A criminal defendant “is entitled to an instruction as to any recognized defense for
16 which there exists evidence sufficient for a reasonable jury to find in his favor.” *Mathews*
17 *v. United States*, 485 U.S. 58, 63 (1988). However, a federal court sitting in habeas
18 review is ordinarily “bound to accept a state court’s interpretation of state law.” *Butler v.*
19 *Curry*, 528 F.3d 624, 642 (9th Cir. 2008). Additionally, a state trial court’s finding that
20 the evidence does not support a claimed defense “is entitled to a presumption of
21 correctness on federal habeas review.” *Menendez v. Terhune*, 422 F.3d 1012, 1029 (9th
22 Cir. 2005). As a result, a petitioner bears an “especially heavy” burden to establish a
23 constitutional violation based on “the failure to give an instruction.” *Hendricks v.*
24 *Vasquez*, 974 F.2d 1099, 1106 (9th Cir. 1992) (quoting *Henderson v. Kibbe*, 431 U.S.
25 145, 155 (1977)).

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28 ² The court of appeals found this claim waived (Doc. 10, Ex. C at 6); therefore, in
addition to lacking merit it is procedurally defaulted.

1
2 Claim 2

3 Brown alleges his Sixth and Fourteenth Amendment rights were violated by the
4 trial court's denial of a "voluntary act" jury instruction. Brown argued that he was forced
5 to participate in the home invasion; therefore, he did not perform a voluntary act.

6 The Arizona Court of Appeals denied the claim, finding the trial court did not
7 commit fundamental error in denying this instruction:

8 Section 13-201, A.R.S., states that a "voluntary act" is a minimum
9 requirement for criminal liability. Section 13-105(42), A.R.S., defines
10 "voluntary act" as "a bodily movement performed consciously and as a
11 result of effort and determination." Our supreme court has clarified that this
12 definition encompasses actions that are not part of the "autonomic nervous
13 system" or taken while "unconscious, asleep, under hypnosis, or during an
14 epileptic fit." *State v. Lara*, 183 Ariz. 233, 234, 902 P.2d 1337, 1338
15 (1995). A voluntary-act instruction is appropriate only if reasonable
16 evidence "support[s] a finding of a lack of a voluntary act." *State v.*
17 *Moody*, 208 Ariz. 424, ¶ 201, 94 P.3d 1119, 1163 (2004); *State v.*
18 *Almaguer*, 232 Ariz. 190, ¶ 19, 303 P.3d 84 (App. 2013).

19 ¶ 23 Brown argues that "his inability to resist the threat to his life
20 implicated his 'fight or flight' reflex, rendering his physical actions
21 involuntary" within the meaning of §§ 13-105(42) and 13-201. He points
22 to his testimony that he, K.C. Reaves, Ashton Walker, and White were
23 driving and one of the men told him they were going to a house to pick up
24 someone to play basketball. According to Brown, E.V. was outside the
25 house when they arrived. After they parked and got out of the car, Reaves
26 aimed a gun at E.V., White told Brown to put on a mask, and White and
27 Reaves started walking E.V. toward the door of the house. Brown testified
28 he put on the mask because he "didn't really have a choice," and when he
lagged behind, White pointed a gun at him and told him to get in front of
E.V. Although Brown testified he felt he did not have a choice, a claim the
jury obviously rejected, no evidence adduced at trial suggested that his
actions were not the result of conscious effort and determination.

(Doc. 10, Ex. C at 14-15.)

22 As interpreted by the Arizona courts, a defendant is only entitled to a voluntary act
23 instruction if evidence demonstrates he did not act consciously, that his actions were
24 reflexive. *See Lara*, 902 P.2d at 1338, 183 Ariz. at 234. This Court presumes the state
25 court finding that Brown's actions were voluntary is correct. Petitioner makes no
26 argument that his actions were involuntary under Arizona law. He argues only that he
27 was "forced" to participate in the crime. According to Brown's version of the facts, he
28 was directed to put on a mask and to enter the apartment, which he did. His actions were

conscious not reflexive. Based on this evidence, Brown was not entitled to a voluntary act instruction under Arizona law. Therefore, denial of the instruction did not violate his right to due process and the state court's denial of this claim was not objectively unreasonable.

Claim 3

Brown alleges his Sixth and Fourteenth Amendment rights were violated by the trial court's denial of a "missing witness" jury instruction. Specifically, Brown contends victim Eddie Vega did not appear and that Vega knew that Brown was forced to participate in the offense.

The Arizona Court of Appeals set forth the following information in denying this claim:

Brown sought the instruction with respect to E.V., who apparently was forced to enter the apartment ahead of the armed home invaders and who did not testify or appear at trial despite the state's attempt to serve him with a subpoena. We review for a clear abuse of discretion a court's decision whether to give a requested instruction. *See State v. Walters*, 155 Ariz. 548, 551, 748 P.2d 777, 780 (App. 1987).

¶ 25 To be entitled to a missing-witness instruction, a defendant must establish that the witness was in the exclusive control of the state and would have provided exculpatory evidence had he or she testified. *Walters*, 155 Ariz. at 551, 748 P.2d at 780; *see also United States v. Leal-Del Carmen*, 697 F.3d 964, 974-75 (9th Cir. 2012) (to obtain missing-witness instruction, party must show (1) witness is "peculiarly within the power of the other party" and (2) inference that missing witness will testify unfavorably to other party is natural and reasonable under the circumstances). Brown argues E.V. was "peculiarly within the power of the Pima County Attorney" because he was alleged to be a victim in the case, and victims are entitled by the Arizona Constitution "[t]o refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant." Ariz. Const. art. II, § 2.1(A)(5).

¶ 26 At trial, the prosecutor informed the court that the state had issued a subpoena for E.V., but was unable to locate and serve him. Although E.V., as a victim, could have declined to be interviewed by Brown before trial, nothing about his status as a victim would have prevented Brown from calling him to testify in support of Brown's defense. *See State v. Riggs*, 189 Ariz. 327, 330, 942 P.2d 1159, 1162 (1997) (Victim's Bill of Rights does not permit victim to refuse to testify at trial). If Brown believed E.V.'s testimony would have been favorable to his defense, he could have listed E.V. as a witness and attempted to serve him with a subpoena. Had he done so, and had the state prevented E.V.'s appearance at trial, then E.V. would

1 be under the state's control; however, such was not the case here. Instead,
2 the state also took steps to secure E.V.'s attendance at trial—that these
3 steps proved unsuccessful suggests the state had no greater control of E.V.
4 than Brown. And, given Brown's ability to call E.V. and the state's own
5 attempts to procure his presence, E.V.'s absence from trial does not permit
6 a rational inference that he would have testified in Brown's
7 favor. Accordingly, a missing-witness instruction was not justified and the
8 trial court did not err by refusing it.

9

10 ⁷ Nor does Brown establish that E.V.'s testimony would have
11 corroborated his defense that he was forced by others to participate in the
12 home invasion. Brown admitted he had never met E.V. prior to the break-
13 in. Like the other home invaders, Brown was wearing a mask, and,
14 although he testified he was pushed into the apartment at gunpoint, he also
15 testified that E.V. was positioned before him. Brown's contention that E.V.
16 would have been able to support his duress defense is therefore speculative
17 and would not support giving the requested instruction.

18 (Doc. 10, Ex. C at 15-17 & n. 7 (other footnote omitted).)

19 As interpreted by the Arizona courts, a defendant is only entitled to a missing
20 witness instruction if the person is within the State's particular power and it is reasonable
21 to infer that the witness would provide testimony favorable to the defendant. *See State v.*
22 *Walters*, 748 P.2d 777, 780, 155 Ariz. 548, 551 (Ct. App. 1987). This Court presumes the
23 state court findings are correct – that the state did not have control over E.V. and that
24 there is no basis to infer E.V. would have testified in Brown's favor. Brown has presented
25 no evidence to the contrary. Further, Brown's argument that the State had control over
26 E.V. is based solely on his status as a victim. As pointed out by the appellate court,
27 although victims cannot be interviewed prior to trial nothing precludes a defendant from
28 subpoenaing the person as a witness. Additionally, Brown fails to establish that E.V., a
stranger, would have offered exculpatory testimony. The trial docket reveals that Brown
did not list E.V. as a trial witness, although the state did. That suggests any testimony he
had to offer was not favorable to Brown. Therefore, denial of the instruction did not
violate Brown's right to due process and the state court's denial of this claim was not
objectively unreasonable.

1 Claim 5

2 Brown alleges his constitutional right to due process and to present a defense were
3 violated by the trial court's denial of a duress jury instruction with respect to first-degree
4 murder and Count Four aggravated assault against a minor under fifteen. The Arizona
5 Court of Appeals denied the claim, finding no fundamental error. (Doc. 10, Ex. C at 12-
6 13.)

7 Under Arizona law, duress is not a defense for homicide or an offense involving
8 serious physical injury. A.R.S. § 13-412(C). Respondents argue this claim is not
9 cognizable because Brown was not entitled to an instruction for a defense not supported
10 by the evidence and the availability of defenses is a matter of state law. Because Brown
11 has raised a claim based on the federal Constitution, the Court will address it on the
12 merits rather than dismissing it as not cognizable.

13 The starting point for this due process analysis is whether the petitioner was
14 erroneously deprived of a jury instruction to which he was entitled under state law. *See*
15 *Davis v. Strack*, 270 F.3d 111, 123 (2d Cir. 2001); *Barker v. Yukins*, 199 F.3d 867, 876
16 (6th Cir. 1999). Because duress is not a recognized defense in Arizona law for homicide
17 or serious physical injury, he had no constitutional right to a duress instruction on such
18 charges. *See Mathews*, 485 U.S. at 53; *Bradley v. Duncan*, 315 F.3d 1091, 1098 (9th Cir.
19 2002) (applying *Mathews* standard to a due process claim raised in a habeas proceeding).
20 There is no clearly established supreme court law to support Brown's argument that the
21 trial court was obligated to give a jury instruction that is not recognized by Arizona law.
22 States are traditionally free to define the elements of crimes and defenses. *See Clark v.*
23 *Arizona*, 548 U.S. 735, 749 (2006). Therefore, denial of the instruction did not violate his
24 right to due process and the state court's denial of this claim was not objectively
25 unreasonable.

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Claim 4

Brown alleges that Arizona's felony murder statute is unconstitutional because, in his case, its application was premised upon the justifiable shooting of an intruder (a co-felon) by a victim. In the Reply brief and supplemental briefs, Brown argues numerous different theories to support his argument that the felony murder statute in Arizona is unconstitutional.

Brown's claim fails because the Supreme Court has never held that it is unconstitutional to convict someone of felony murder based on Brown's circumstances. *See Brewer v. Hall*, 378 F.3d 953, 955 (9th Cir. 2004) ("If no Supreme Court precedent creates clearly established federal law relating to the legal issue the habeas petitioner raised in state court, the state court's decision cannot be contrary to or an unreasonable application of clearly established federal law."). In particular, the Supreme Court has never held that felony murder is cruel and unusual punishment, and felony murder is not in itself a punishment statute. *See Lockett v. Ohio*, 438 U.S. 586, 602 (1978). The fact that other states have chosen to define felony murder differently or more narrowly has no bearing on the constitutionality of Arizona's statute. However, the Court will address some of Brown's specific arguments.

First, to the extent Brown challenges Arizona's felony murder statute generally or the fact that he can be held responsible for the murder as an accomplice, that has no constitutional merit. *See Lockett*, 438 U.S. at 602 ("That States have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony-murder statutes is beyond constitutional challenge."). Second, Brown argues that the Arizona statutes do not provide constitutionally sufficient notice that accomplice liability can provide a basis for a charge of first degree murder. The felony murder statute states that a person can be found guilty of first degree murder by acting alone "or with one or more persons" to commit burglary or robbery and in the course of that offense, the person "or another person" causes a death. A.R.S. § 13-1105(A)(2). This language

1 provides clear notice that an accomplice to burglary or robbery can be held responsible
2 for a death that occurs in the course of those felonies. Petitioner relies on subsection (1)
3 of A.R.S. § 13-1105(A) to argue that all first degree murder convictions in Arizona
4 require intent to cause death. Subsection (1) pertains to premeditated murder and
5 subsection (2) pertains to felony murder; the State need satisfy only one or the other to
6 prove first degree murder, it need not prove the elements of both. The *Phillips* case upon
7 which Petitioner relies precludes accomplice liability only for premeditated murder but
8 recognizes an accomplice may be guilty of felony murder if all the elements are
9 established. *State v. Phillips*, 46 P.3d 1048, 1057, 202 Ariz. 427, 436 (2002), *as*
10 *supplemented* 27 P.3d 1228, 205 Ariz. 145 (2003).

11 The state court's denial of this claim was not contrary to or an unreasonable
12 application of Supreme Court law.

13 **Claim 6**

14 Brown alleges his Sixth Amendment right to counsel and Fourteenth Amendment
15 due process rights were violated by the police questioning him a second and third time
16 without an attorney or an initial court appearance. Therefore, admission of his statements
17 was unconstitutional.

18 The Arizona Court of Appeals denied this claim finding no fundamental error:

19 Brown acknowledges that his right to counsel under the Sixth Amendment
20 had not attached when he gave his statements. *See McNeil v. Wisconsin*, 501 U.S. 171, 175, 111 S. Ct. 2204, 115 L.Ed.2d 158
21 (1991) (Sixth Amendment right to counsel does not attach until initiation of
22 adversary judicial criminal proceedings, “whether by way of formal
23 charge, preliminary hearing, indictment, information, or
24 arraignment”), *quoting United States v. Gouveia*, 467 U.S. 180, 188, 104
25 S.Ct. 2292, 81 L.Ed.2d 146 (1984). He contends, however, that under Rule
6.1(a), Ariz. R. Crim. P., he had a right to consult with counsel “as soon as
feasible after [being] taken into custody,” (emphasis omitted) and that this
right was denied.

¶ 14 Brown is correct that he had a right to consult with counsel—indeed,
Detective Diaz informed him of the right before beginning the August 26
interview and confirmed his understanding before the August 27 interview.
But Brown waived that right by failing to invoke it. *See State v. Eastlack*, 180 Ariz. 243, 250–51, 883 P.2d 999, 1006–07 (1994) (suspect
must clearly invoke right to counsel). Accordingly, the trial court did not

1 commit fundamental error by failing to suppress his statements on this
2 ground.

3 ¶ 15 Brown also argues that he was denied his right to a timely initial
4 appearance, which in turn prevented the attachment of his Sixth
5 Amendment right to counsel. Rule 4.1(a), Ariz. R. Crim. P., provides that
6 an arrested person must be brought before a magistrate “without
7 unnecessary delay” and that if this initial appearance does not occur within
8 twenty-four hours after arrest, the person must be released. The comment to
9 the 2007 amendment of Rule 4.1(a) explains that “[t]his provision defines
10 the applicable standard of promptness as without unreasonable delay and in
11 no event more than 24 hours after arrest.” The state argues that the twenty-
12 four hour rule was “impracticable” and there was no Rule 4.1 violation
13 because the delay in bringing Brown before a magistrate was due to his
14 hospitalization—thus, not “unnecessary”—and he was given his initial
15 appearance the same day he was released from the hospital.

16 ¶ 16 The parties cite no Arizona authority, nor do we find any, addressing
17 whether a defendant’s hospitalization excuses delay in providing him or her
18 with an initial appearance. We find guidance, however, in decisions from
19 other jurisdictions holding that delay arising from a need to provide the
20 accused with medical treatment is excusable under their respective rules
21 requiring an initial appearance without unnecessary delay.

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23 ¶ 18 We agree with the reasoning of the above decisions and conclude that
24 because the necessity of Brown’s medical treatment caused the delay in
25 providing his initial appearance and he was brought before a magistrate
26 within twenty-four hours of his release from the hospital, the delay was
27 neither unnecessary nor unlawful. Accordingly, Brown has demonstrated
28 no fundamental error, on this record, by the introduction at trial of his
hospital statements. *See United States v. Redlightning*, 624 F.3d 1090, 1109
(9th Cir. 2010) (where portion of delay due to government’s conduct not
unreasonable, no violation of prompt presentment requirement and district
court did not err in refusing to suppress confession); *United States ex rel.*
Dove v. Thieret, 693 F.Supp. 716, 722 (C.D.Ill. 1988) (“it is clear that the
Sixth Amendment right to counsel does not accrue prior to the initiation of
formal adversarial judicial proceedings simply because police interrogate
an individual”); *Green*, 274 N.E.2d at 271 (statements made while in
hospital admissible despite lack of counsel because “right to an immediate
hearing is necessarily waived for the benefit of the injured
accused”); *People v. Solorzano*, 94 A.D.3d 1153, 944 N.Y.S.2d 154, 155
(2012) (“To suppress a statement ... there must be evidence that
[presentment] delay was for the purpose of depriving the defendant of the
right to counsel and obtaining an involuntary confession, and that this delay
was strategically designed so that an accused could be questioned outside
the presence of counsel.”) (citation omitted); *see also People v. White*, 395
Ill.App.3d 797, 334 Ill.Dec. 943, 917 N.E.2d 1018, 1039–40 (2009) (no
attachment of Sixth Amendment right to counsel in absence of formal
judicial proceeding even when arraignment delayed by eight days); *cf. In re*
Walker, 112 Cal.Rptr. 177, 518 P.2d at 1135–37 (upholding admission of
defendant’s statements obtained during ten-day hospital stay as voluntary
and noting concomitant delay of initial appearance); *People v. Dove*, 147

Ill.App.3d 659, 101 Ill.Dec. 97, 498 N.E.2d 279, 284 (1986) (Sixth Amendment right to counsel not violated where arraignment delayed by four days as a result of transportation and court holidays).

(Doc. 10, Ex C at 7-12.)

First, Brown alleges his right to counsel was violated by the detective questioning him three times without counsel. The Sixth Amendment right to counsel attaches “at or after the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984)). Because adversarial criminal proceedings had not begun at the time Brown was questioned, Brown’s right to counsel had not attached and was not violated. Additionally, Brown was informed of his right to consult counsel at the first interrogation, and he never invoked that right.

Second, Brown alleges his right to due process was violated by the detective questioning him three times prior to an initial appearance. There is no clearly established Supreme Court law holding that it is unconstitutional to admit voluntary statements obtained prior to the initiation of criminal proceedings, even if those proceedings are delayed longer than typical or beyond state time limits.³ Therefore, the AEDPA dictates that Brown is not entitled to relief on this claim.

CERTIFICATE OF APPEALABILITY

Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, this Court must issue or deny a certificate of appealability (COA) at the time it issues a final order adverse to the applicant. A COA may issue only when the petitioner “has made a

³ Brown cites *Corley v. United States*, 556 U.S. 309 (2009). That case is not based on the constitution but on the federal rule for prompt presentment after arrest, which has no application to state court proceedings. *Id.* at 307. Further, Brown asserts that the police delayed his initial appearance to obtain further statements from him. This argument is not supported by the factual record. The second interview of Brown occurred less than 24 hours after he was arrested, prior to the required time for presentation to a magistrate under the Arizona rules. The police did not initiate any questioning outside that 24-hour window.

1 substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This
2 showing can be established by demonstrating that “reasonable jurists could debate
3 whether (or, for that matter, agree that) the petition should have been resolved in a
4 different manner” or that the issues were “adequate to deserve encouragement to proceed
5 further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463
6 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable
7 jurists could debate (1) whether the petition states a valid claim of the denial of a
8 constitutional right, and (2) whether the court’s procedural ruling was correct. *Id.* The
9 Court finds that reasonable jurists would not find this Court’s procedural rulings or merits
10 rulings debatable. Therefore, a COA will not issue.

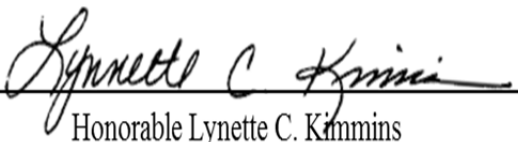
11 Accordingly,

12 **IT IS ORDERED** that the Petition for Writ of Habeas Corpus is **DISMISSED**.

13 **IT IS FURTHER ORDERED** that the Clerk of Court should enter judgment and
14 close this case.

15 **IT IS FURTHER ORDERED** that, pursuant to Rule 11 of the Rules Governing
16 Section 2254 Cases, in the event Petitioner files an appeal, the Court denies issuance of a
17 certificate of appealability.

18 Dated this 28th day of December, 2017.

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22 Honorable Lynette C. Kimmins
23 United States Magistrate Judge
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